STATE OF MICHIGAN

COURT OF APPEALS

KAROL ROSS,

Plaintiff-Appellant,

v

RAYMOND L. SCODELLER, Personal Representative of the Estate of ELLEN SPAGNUOLO, Deceased,

Defendant-Appellee.

UNPUBLISHED
February 18, 2000

No. 216337
Livingston Circuit Court
LC No. 97-016292-NO

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of a fall by plaintiff on the sidewalk on the premises of Ellen Spagnuolo. Defendant is the personal representative of Spagnuolo, who is now deceased. Plaintiff provided home health care to Spagnuolo between January 1997 and April 1997. In April 1997, Spagnuolo was hospitalized for a short period and released. On the day Spagnuolo came home, plaintiff went to Spagnuolo's home to bring Spagnuolo her clothes from the hospital. When plaintiff arrived, she parked on the street, left her vehicle, and walked up to Spagnuolo's front door by way of the sidewalk with an armful of clothes. As plaintiff proceeded up the walk to the front door her boot caught the lip of the sidewalk and she fell. Although plaintiff stated that she was concerned about not dropping Spagnuolo's clothing, she testified that, had she been looking, she would have noticed the crack.

We review the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Plaintiff argues that the trial court erred when it applied the open-and-obvious-danger doctrine to plaintiff's failure-to-maintain theory of liability. However, in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495, 497; 595 NW2d 152 (1999), this Court specifically held that the open-and-obvious-danger doctrine applies to negligence claims alleging a failure to maintain as well claims alleging a failure to warn. Therefore, plaintiff's argument is without merit.

Plaintiff also argues that the trial court erred by concluding that the broken sidewalk was not an unreasonable risk of harm despite its open and obvious nature. The open-and-obvious-danger doctrine generally relieves an invitor of the duty to warn or protect the invitee of open and obvious dangers; however, the invitor still owes a duty to protect the invitee from conditions that pose an unreasonable risk of harm despite their open and obvious nature. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995); *Millikin, supra* at 498. However, where "the condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger," the invitor is not liable. *Bertrand, supra* at 611. Where, as here, "[t]he plaintiff's only asserted basis for finding that the [condition] was dangerous was that she did not see it," the plaintiff has failed to demonstrate that the condition posed an unreasonable risk of harm. *Id*. at 621. See also *Millikin, supra* at 499. In this case, the condition of the sidewalk was easily noticeable and easily avoided. Plaintiff has failed to demonstrate anything unusual about the condition of the sidewalk that would lead us to conclude that it posed an unreasonable risk despite its open and obvious nature.

Plaintiff contends that the determination whether the condition posed an unreasonable risk should be left to a jury. Where a condition poses an unreasonable risk, then the jury must determine whether the invitor took reasonable precautions to protect the invitee from the risk. *Bertrand, supra* at 611. However, where a plaintiff does not present a genuine issue of fact that the condition posed an unreasonable risk despite its open and obvious nature, summary disposition for the defendant is appropriate. See *Millikin, supra* at 499.

Finally, plaintiff argues that the trial court incorrectly applied the doctrine of comparative negligence as a bar to recovery. The open-and-obvious-danger doctrine is a defense to the duty element of a negligence claim. *Millikin, supra* at 495-496. Comparative negligence, on the other hand, is a doctrine under which "a defendant may present evidence of a plaintiff's negligence in order to reduce liability." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 98; 485 NW2d 676 (1992). The two doctrines are separate. Contrary to plaintiff's argument, the record indicates that the trial court did not use plaintiff's comparative negligence to bar recovery. When read in context, the trial court's comments were part of its determination whether the sidewalk posed an unreasonable risk of harm.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen